Supreme Court, U. S.
FILED
JAN 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER,

*Petitioner,*

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

*Respondents.*

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HENRY A. KISSINGER,

*Petitioner,*

v.

MILITARY AUDIT PROJECT, *et al.*,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 8, 1979

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Henry A. Kissinger respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The *per curiam* judgment of the Court of Appeals and an accompanying memorandum, which will not be reported, is reproduced in the Appendix. The opinion of the District Court, which is reported at 442 F.Supp. 383, and its unreported orders of January 25, 1978, and March 2, 1978, are also reproduced in the Appendix (hereafter "App.").

## JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Does the Freedom of Information Act authorize district courts to order persons who are not agencies to transfer to an agency documents which are not, and never were, in the custody or control of the agency and which the agency does not, and never did, claim as its records?

2. If the Freedom of Information Act does authorize this type of suit, what standards should apply in determining whether such documents are "agency records" within the meaning of the Act?

3. If the documents reflect both personal conversations and conversations that pertain to government business, is it constitutionally permissible to authorize government officials to possess, read and retain all of them?



## STATUTES AND REGULATIONS

The relevant portions of the Freedom of Information Act, 5 U.S.C. §552, the Privacy Act, 5 U.S.C. §552a, the Federal Records Act and related laws, 44 U.S.C. Chapters 21, 29, 31 and 33, the Federal Property Management Regulations, 41 C.F.R. Part 101-11, and the Foreign Affairs Manual of the Department of State, 5 FAM Part 400, are reproduced in the Appendix.

## STATEMENT OF THE CASE

### A. Introduction

At issue in this case are certain rough notes made of Dr. Kissinger's telephone conversations when he was Secretary of State, which he donated upon leaving office to the United States and deposited with the Library of Congress. After the notes had been transferred to the Library, respondents filed Freedom of Information Act ("FOIA") requests with the Department of State seeking access to them. The Department denied their requests, and respondents sued it under FOIA to contest the denial. In this suit respondents also joined Dr. Kissinger and the Librarian of Congress and asked for an order directing them to transfer the notes to the State Department. The decision below grants this relief.[1]

---

[1] Plaintiffs below were two groups of FOIA claimants: (a) the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, and William Safire (the "RCFP respondents"); and (b) the Military Audit Project and Felice D. Cohen (the "MAP respondents"). The defendants below, in addition to Dr. Kissinger, were the Department of State and its Secretary, Cyrus R. Vance, the Librarian of Congress, Daniel J. Boorstin, and the Archivist of the United States, James B. Rhoads.

FOIA requires the production of "agency records," but does not define the term. In this case, the State Department concluded — both before and after the donation — that under its rules the notes were not "records." The courts below ignored the Department's application and interpretation of its rules, and found instead that the notes are records because the Department had a common law right to own and possess them. In so doing, they assumed, without discussion, that FOIA permits private citizens to challenge agency recordkeeping decisions, that courts may review such decisions *de novo*, and that in such cases agency rules and practices need be given no weight.

Dr. Kissinger believed when the notes were made that they would not be treated as official records. That belief was based on the Department's established practice and regulations, as confirmed by a written opinion of its Legal Adviser. The decision below retroactively reclassifies the notes as records. It is undisputed that the notes contain purely private conversations and other unofficial matters intermingled with discussions of government business. Yet the order below requires that all of the notes must be transferred to permanent State Department custody and that all of them must be read by its personnel to determine which are subject to FOIA disclosure.

No court has ever before held that FOIA applies to documents not in the custody or control of an agency, or to persons who are not "agencies." No court has ever before held that FOIA authorizes *de novo* review of agency recordkeeping determinations. No court has ever before sanctioned government seizure of private papers to serve the interests of FOIA claimants.

We believe the decision below is wrong both in law and in principle. We ask this Court to grant certiorari so that the important issues of federal law which it presents may be reviewed.



## B. Facts

The legal issues are novel and substantial. The facts, by contrast, are neither complicated nor disputed.[2]

### The Telephone Notes

The documents at issue in this case came into being as the result of a common practice known as monitoring, in which a third party listens to and takes notes of a government official's telephone conversations. This procedure has been used for decades by senior officials to assist in the internal management of their offices. The notes serve as a rough log or daily diary to which the official and his immediate staff can refer in carrying out the ongoing work of the office. This work includes the production of correspondence, memoranda and other formal documents which are filed as official records of the agency. The notes are not filed, because they have traditionally been regarded as preliminary working papers that have no official significance after the records are created.[3]

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[2]Most of the facts appear in an uncontroverted affidavit which Dr Kissinger filed in the District Court. App. 73a. Other references are to the Joint Appendix ("JA") filed in the Court of Appeals.

[3]Notes, drafts, preliminary worksheets and similar papers fall within a general class of informal documents known as "non-record materials." Such materials need not and, indeed, should not be filed as records. *See* 41 C.F.R. §101-11.401-3(d) and pp. 18-20, *infra*. A recent study prepared for the National Study Commission on Records and Documents of Federal Officials (hereafter "National Study Commission") states that

> [f]ederal officials in all branches of government accumulate information in the form of memoranda of conversations, transcripts, speeches, taped conversations, diaries, and correspondence reflecting the private opinions and advice of colleagues and others. Such records are not "personal" in that they do not deal with strictly private affairs and they are not "official" in the sense that they do not directly document the transactions and policies of federal

The same procedures were followed in Dr. Kissinger's case. During his years in government, a secretary generally listened to and took notes of Dr. Kissinger's telephone conversations. The notes were then used by his Executive Secretary to make up his appointments calendar. His Senior Special Assistant also read them to keep abreast of his activities in order to know whether any matters discussed by telephone required follow-up or implementation. The function of the notes was to ease the administrative burdens of the office; they had no other purpose. App. 73a-74a. The notes were not official records of Dr. Kissinger's oral commitments and decisions; the official records were the formal documents that were produced, circulated and filed in the ordinary course of business as part of the follow-up process.[4]

The notes were never circulated outside Dr. Kissinger's office, never intermingled with the State Department's official records, and never seen by anyone other than Dr. Kissinger's immediate aides. Throughout his years at the State Department, the notes were kept in Dr. Kissinger's office with his personal papers in files marked "personal." App. 74a-75a. This treatment was consistent with his understanding that the notes were "workaids which I could

organizations. Such material has usually been treated as personal correspondence.

National Study Commission, Memorandum of Findings on Existing Custom or Law, Fact and Opinion 59 (1977).

[4]The official records of Dr. Kissinger's oral transactions are voluminous. One of the FOIA requests filed in this case asked for all "memoranda, aide memoirs, memoranda of conversation . . . or other written" records of conversations "conducted by Mr. Kissinger in his capacity as Secretary of State. . . ." JA 84. The Department denied this request as overly broad, stating it "apparently includes aide memoires, diplomatic notes, memoranda of meetings, memoranda of telephone conversations and correspondence between the former Secretary and persons both within and without the Department of State — a very large and undifferentiated volume of material." JA 90.



retain or discard as I chose as had several of my predecessors and many other officia. App. 74a.

Because the notes were not designed to serve as official records, no effort was made to restrict monitoring to purely business calls. The notes therefore reflect not only official but also many non-official and private conversations.[5] App. 74a. Nor were the notes edited for accuracy and completeness or to remove personal and other irrelevant matters. There was no need for this. Those who had access to them — Dr. Kissinger and his closest aides — already knew the substance of the conversations and could obtain the limited information they needed from the unedited materials. App. 75a.

Had Dr. Kissinger known the notes might be viewed as official records, he would have been obliged to put them in proper form for filing.[6] Since he had no duty to create a

[5]Respondents argued below, and the District Court found, that the notes necessarily related to official matters because State Department policy prohibited monitoring except when "absolutely essential to the conduct of business." App. 56a. This conclusion is based on a misreading of a letter from the Department's Acting Assistant Secretary for Congressional Relations to former Congresswoman Bella Abzug. In fact, the letter states that the general prohibition is subject to an exception which permits "a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making appointments and to improve the general efficiency of operations." App. 85a-86a.

[6]Dr. Kissinger's affidavit makes clear that, while some of the notes are substantially verbatim,

> many others are only rough approximations of what was said [containing] misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records. App. 78a.

record of every telephonic statement uttered during his tenure as Secretary of State, he would probably have chosen to discontinue the note-taking altogether rather than undertake this arduous and time-consuming task. App. 75a.

**The Donation**

Near the end of his term, Dr. Kissinger decided to donate papers relating to his career in government and earlier years to the United States. He chose the Library of Congress as depository because it already had an extensive collection of papers donated by previous Secretaries of State. App. 75a.

The donation included personal materials collected during his years at Harvard, copies of official documents on which he had worked, and the contents of personal files he had accumulated while in government. App. 75a. To donate the papers relating to his activities as Secretary of State, it was necessary for him to comply with State Department security regulations and other rules applicable to removal of papers by retiring officials. This he did. App. 75a-76a, 80a-83a.

As part of this process, Dr. Kissinger sought and received a written opinion of the Department's Legal Adviser concerning the status of the telephone notes. This opinion confirmed previous oral advice that the notes were not State Department records.[7] However, to assure completeness of the Department's records, the Legal Adviser recommended that the notes be reviewed and extracts made of any discussion of a significant government activity or decision not otherwise reflected in the official files. App. 67a. This, too, was done; the extracts were then delivered to the

[7]The oral advice was first given in January 1976, when the State Department rejected a FOIA request for a portion of the notes on the ground that they were not records subject to the Act. This advice was repeated on a number of occasions thereafter, JA 271-72, and reduced to writing on November 11, 1976. App. 65a, 76a.



Department and are presently filed there with the other records of Dr. Kissinger's service as Secretary. App. 77a.

The donation was made in November and December 1976, pursuant to deed of gift agreements signed by Dr. Kissinger and the Librarian of Congress. The donation agreements restrict access to most of the collections for a term of years. Since the telephone notes affect Dr. Kissinger's privacy and the privacy of those with whom he spoke, the agreements restrict access to these materials during the lives of both parties to the conversations.[8] App. 77a-78a.

### C. Proceedings Below

After the donation was completed and publicly announced, two sets of claimants filed FOIA requests with the State Department seeking access to them.[9] The State Department denied the requests on two grounds: *first*, that the notes were not "agency records" subject to FOIA, and *second*, that the documents were not in any event within its custody or control. Following denial of their requests, respondents brought separate suits — later consolidated — not only against the State Department but also against the Librarian of Congress and Dr. Kissinger.

On cross-motions for summary judgment filed by respondents and by Dr. Kissinger, the District Court held that the notes made of Dr. Kissinger's conversations when he was Secretary of State were State Department agency records

[8]Such restrictions are common. *See, e.g.*, J. Broderick, Personal Papers of Federal Officials 15-17 (Library of Congress 1976); National Study Commission, Study of the Records of Supreme Court Justices 46-50 (1977).

[9]The RCFP respondents requested access to all the notes, including those made when Dr. Kissinger was a Presidential Assistant. The MAP respondents limited their request to notes made when Dr. Kissinger was Secretary of State.

which must be returned to its custody.[10] App. 58a. Since the notes had never previously been part of the Department's record system, the District Court's order directed the Department to take possession of them, to read them to determine which portions are subject to FOIA disclosure and, thereafter, to release all non-exempt portions to respondents.[11] App. 60a-61a.

On appeal, the Court of Appeals affirmed in a *per curiam* order entered seven days after oral argument. In a memorandum, which under Local Rule 8(f) is not published, the court stated it was "in full agreement on all issues with the opinion of the District Court . . . and its orders issued pursuant thereto . . . ."[12] App. 49a.

[10]The District Court denied the portion of the RCFP motion which related to notes made when Dr. Kissinger was a Presidential Assistant. App. 59a-60a. The decision on this point was affirmed on appeal, App. 49a-50a, and is not here at issue.

[11]The government defendants did not move for summary judgment; they advised the District Court that none of their rights were foreclosed by a decision in the case and they had no objection to decision of the case on the basis of Dr. Kissinger's motion. Transcript of Oral Argument 26 (September 28, 1977). They also did not appeal, but instead submitted an *amicus curiae* brief supportive of Dr. Kissinger's position.

[12]This Court stayed the District Court's order pending the Court of Appeals' decision. The Court of Appeals has stayed issuance of its mandate pending the filing of Dr. Kissinger's petition for writ of certiorari.



## REASONS FOR GRANTING THE WRIT

**Summary: This Case Presents Novel And Substantial Issues Concerning The Scope Of The Freedom Of Information Act, The Relationship Between That Act And The Federal Records Act, And The Constitutional Privacy Rights Of Past And Present Federal Officials.**

The courts below held, on the authority of *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), that FOIA authorizes declaratory and injunctive relief against persons who are not "agencies." This unprecedented conclusion is bottomed on the assumption that FOIA applies to any document originated by a government employee, whether or not the agency has it within its custody or control. That assumption conflicts with the language of the Act. FOIA authorizes courts to order agencies to cease withholding records they are obliged to produce. It does not authorize courts to order agencies to create documents, or to direct agencies to procure documents they do not have. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Nothing in *Bannercraft* suggests that a court may require third parties to deliver documents to an agency in order to cure what otherwise would be a lack of subject matter jurisdiction.

The relief granted below was predicated on the conclusion that the notes were State Department "agency records." That conclusion was based not on a finding that the State Department's records management rules were invalid or improperly applied, but on the theory that the Department had a common law property right in all documentary materials produced by Dr. Kissinger within the scope of his employment. The assumption that FOIA grants courts *de novo* authority to decide whether documents sought under the Act are "agency records," and

to disregard agency rules and practices in making such decisions, opens a new and very broad avenue for citizen suits to second-guess agency recordkeeping determinations. We believe Congress intended no such result.[13]

The decision below also raises more fundamental questions. Dr. Kissinger legitimately believed when the notes were made that they would not be treated as official State Department records. The decision below retroactively reclassifies the notes as records in a manner which invades Dr. Kissinger's constitutional privacy rights and threatens the privacy rights of many other past and present government employees. The order below goes further. Although the District Court found the notes were "personal in some respects," App.58a, it nonetheless directed the State Department to take possession of and to read them all.

[13]In the memorandum accompanying its judgment, the Court of Appeals says that, because the Government did not appeal, "a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary." App. 49a. If this cryptic remark was intended to imply that the Government is the only proper party to argue the above issues, it is surely wrong.

It is not possible to affirm the District Court without accepting its assumption that FOIA provides *de novo* review of agency record-keeping determinations, nor is it possible to render any judgment against Dr. Kissinger without first establishing *respondents' right* to assert that the notes belong to the State Department. *Cf.* 44 U.S.C. §3106; *see* note 16, *infra*.

It is clear that a party affected by a judgment may, on appeal, urge any grounds sufficient to secure reversal, even though reversal also benefits non-appealing parties. *In re Barnett*, 124 F.2d 1005, 1008-1011 (2d Cir. 1942); *see also Continental Casualty Company v. United States*, 167 F.2d 107 (9th Cir. 1948), *cert. denied*, 337 U.S. 940 (1949). The decision below was based on FOIA, but FOIA provides no foundation for judgment against any of the defendants. Dr. Kissinger is fully entitled to urge this defect as grounds for reversal, whether or not the Government defendants appeal. The Government agrees. *See* Brief of the United States as *Amicus Curiae*, filed in the Court of Appeals, at 22-23.



None — regardless of content — is to be returned. Respondents argued below that *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), provides support for this extraordinary procedure. If *Nixon* was, indeed, the inspiration for the order, we believe the courts below seriously misapplied it. And if *Nixon* does not support the order, there is no decision of this or any other court which could possibly justify it.

### A. The Decision Below Misapplies *Bannercraft* And Impermissibly Extends The Scope of FOIA To Documents Not In The Custody Or Control Of An Agency And To Persons Who Are Not Agencies.

We begin with a self-evident proposition: FOIA does not apply to Dr. Kissinger, a private citizen, or to the Library of Congress, which is not an "agency." *See* 5 U.S.C. §552(e). Yet the relief granted was an injunction directing these parties to transfer the notes to the State Department. The threshold question is whether FOIA authorizes remedial orders of this sort. The courts below held that it does, on the rationale that the objective of the injunction was to assist in enforcing the Act.

But this reasoning creates new difficulties. FOIA requires agencies to produce their records on proper demand, and provides in paragraph (a)(4)(B) that a district court

> has jurisdiction to enjoin the *agency* from *withholding* agency records and to order the production of any agency records *improperly withheld* from the complainant. . . (emphasis added).

Does an agency "withhold" documents when it does not have them? Does the Act give a district court jurisdiction to order the agency to procure the documents? If not, can a

court order parties who are not "agencies" to deliver documents to the agency so the Act will apply?

It is settled that the Act does not require an agency to *create* records, even though this might well serve the public interest in obtaining more information about the agency's actions. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. at 161-62. The logic of *Sears* would appear to apply equally to situations where documents exist, but are not "withheld" because the agency has no capacity to produce them.[14]

The District Court, of course, recognized the Act could not apply unless the State Department first obtained possession of the notes, just as it evidently recognized its lack of authority to order the Department to procure them. But the court thought it could avoid this statutory limitation by invoking its "broad equitable powers" to compel third parties to deliver the notes to the Department so the Act would apply. App. 55a.

The District Court said its solution was supported by this Court's opinion in *Renegotiation Board v. Bannercraft*

[14]The Attorney General and several lower courts have concluded that it does. *See* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23-24 (1967) (the Act "refers, of course, only to records in being and in the possession and control of an agency. . . . [It] imposes no obligation to compile or procure a record in response to a request"); *Nichols v. United States*, 325 F. Supp. 130, 137 (D.Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972) ("the Court may not require production of records not in the custody or control of an agency"); *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977) ("the Government cannot be compelled to obtain possession of documents not under its control or to furnish an opinion where none is written"). The District of Columbia Circuit has also noted the logical connection between creating and procuring records. *See Forsham v. Califano*, No. 76-1308, Maj. Op. at 15 (D.C. Cir., July 11, 1978) ("The Freedom of Information Act only gives a right of access to agency records in existence. It does not confer a right to have the government generate agency records, either by creation, subpoena or contract demand").



*Clothing Co.*, 415 U.S. 1 (1974). But *Bannercraft* says nothing whatever about the power of a district court to order an agency to procure a document it does not have, or to order persons not subject to the Act to deliver such documents to an agency.

The documents at issue in *Bannercraft* were official agency records in the custody of the Renegotiation Board. The only question was whether FOIA section 552(a)(4)(B) authorized the district court to enjoin further Board proceedings until such time as the Board produced records it was wrongfully withholding. The Court held the injunction was improper in the case before it because this would interfere with established procedures for renegotiating government contracts. However, it also said that an injunction against withholding documents was not the sole equitable remedy authorized to aid in enforcing the Act. 415 U.S. at 17-20. The District Court below read this passage as a blanket authorization to employ any form of equitable relief which furthered its "role as the 'enforcement arm' of the Freedom of Information Act." App. 55a. We believe this is an egregious misreading of *Bannercraft*.

Respondents had no legally enforceable claim against the State Department, or any right to sue Dr. Kissinger or the Librarian of Congress under FOIA.[15] The District Court had no subject matter jurisdiction under that or any other statute to enter an order against any of these parties. The notion that it could use its "equitable powers" to *create*

[15]Other lower courts have dismissed FOIA complaints against persons who are not "agencies." *See Ciccone v. Waterfront Commission*, 438 F.Supp. 55 (S.D.N.Y. 1977); *Lombardo v. Handler*, 397 F.Supp. 792 (D.D.C. 1975), *aff'd per curiam*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977); *Independent Investor Protective League v. New York Stock Exchange*, 367 F.Supp. 1376 (S.D.N.Y. 1973).

jurisdiction where none exists is nonsense. Remedies derive from rights, not rights from remedies. There is no indication whatever in *Bannercraft* of an intention to abandon this fundamental juridical principle.[16]

The decision below represents a hopeless confusion of ideas. Had respondents sued only Dr. Kissinger and the Librarian, it would have been obvious that they had no standing to act as the State Department's surrogate in asserting an ownership claim the Department did not choose to make. *Cf. Nichols v. United States*, 460 F.2d at 674-75. Had they sued only the State Department, it would have been equally clear they could not use FOIA or mandamus or any other form of action to compel it to assert its ownership interests against Dr. Kissinger. Why respondents' claim is improved by indiscriminately mixing separate claims in a single count was not explained, and in our view cannot be explained.

Respondents' complaints should have been dismissed for failure to state a claim. The refusal to do so raises a substantial question concerning the scope of FOIA, which this Court should review.

[16]This case is concerned not with the Government's authority to recover illegally removed records, but with the authority of FOIA litigants to assert such claims independently of the Government. Dr. Kissinger's successor in office is expressly authorized by 44 U.S.C. §3106 to request the Attorney General to commence suit for recovery of the notes, if he believes they are "unlawfully removed" records of his agency. Respondents plainly have no private right to enforce that statute, either directly, *see Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 976 (1977); *Cort v. Ash*, 422 U.S. 66 (1975), or by mandamus. *See Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412 (D. Ala.) (three judge court), *aff'd*, 447 F.2d 1304 (5th Cir. 1971). The District Court acknowledged the existence of the statutory remedy, but ignored its exclusivity and concluded that respondents "need not wait for institution of the statutory retrieval action" when Government action "appears unlikely." App.55a. Why private citizens should be entitled to invoke FOIA to retrieve documents which the responsible agency head does not seek or claim was not explained.



### B. The Decision Below Improperly Assumes That FOIA Authorizes *De Novo* Review Of Agency Recordkeeping Determinations And Adopts A Definition Of Agency Records Which Conflicts With The History And Purposes Of The Federal Records Act.

FOIA provides in paragraph (a)(4)(B) that when "agency records" have been "improperly withheld" from a complainant, the court shall

> in such case . . . determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section . . . .

The provision for *de novo* review clearly applies when the agency withholds records on a claim of exemption under subsection (b). *Department of Air Force v. Rose*, 425 U.S. 352, 379 (1976). Does it also apply when the agency has no "records" to "withhold" because it denies the documents the complainant seeks are records? If so, what law should the court apply in making its independent determination that the documents are or are not "agency records"? And how, as a practical matter, can courts make these determinations without detailed knowledge of the agency's operations and needs?

These are serious and substantial questions. FOIA allows any member of the public access to agency records, without regard to the usual standing requirements. It also dispenses, at least in some circumstances, with the traditional rule that a court may not substitute its judgment for that of an

agency unless the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. If in addition the Act affords private litigants the right of unlimited judicial review of agency recordkeeping determinations, the result will be to thrust courts into the business of deciding what documents an agency should or should not keep in its files. And if courts may, in deciding such questions, define "agency records" by reference to common law property theories, there is serious danger that the records management functions assigned to agencies by the Congress will be subverted. Whether Congress intended such far-reaching consequences requires, we think, more reasoned analysis than the courts below chose to provide.

The Federal Records Act ("FRA") defines "records" in general terms as any documentary materials

> made or received by an agency . . . under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of date in them. . . . 44 U.S.C. §3301.

It also provides that each agency shall have the responsibility for creating an "adequate and proper documentation" of its "essential transactions," 44 U.S.C. §3101, and states that one of the objectives of records management is to "prevent the accumulation of unnecessary records." 44 U.S.C. §2902(3).

The history of this legislation makes clear that FRA places "responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved" as records. H.R. Rep. No. 559, 78th Cong., 1st Sess., *reprinted in* [1943] U.S. Cong. Ser. 2140, 2141. It also makes clear that



> [r]ecords come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, *but first of all to serve the administrative and executive purposes of the organization that creates them.* There is danger of this simple, self-evident fact being lost for lack of emphasis. *The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.* S. Rep. No. 2140, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Cong. Ser. 3547, 3550 (emphasis added).

Rules adopted by the State Department under FRA reflect the same concerns.[11] The Department's general policy on records creation recognizes that there is a need both to "insure that important policies, decisions and operations are adequately recorded" and to prevent the "accumulation of unnecessary files." 5 FAM §422.1. Its specific recordkeeping rules repeatedly emphasize that their objective is to record "important," "necessary," "essential," "significant," and "pertinent" information. *See* 5 FAM §§422.1, 423.1, 423.2, 423.2-1, 432. Consistently with that objective, the rules expressly provide that

> [r]ough drafts and working papers, such as preliminary notes, do not constitute required documentation unless they form an integral part of the finished document or show changes in policy. 5 FAM §423.2-8.

[11]The State Department's recordkeeping rules and practices are consistent with those of other federal agencies. *See* National Study Commission, Memorandum of Findings on Existing Custom or Law, Fact and Opinion 75-99 (1977).

These rules confirm what common sense suggests: government employees routinely generate large quantities of written materials which, though made or received in performance of their official duties, are nonetheless not treated as "records." Such "non-record materials" are not filed because they do not constitute "required documentation." Indeed, the Federal Property Management Regulations, which provide guidance to all federal agencies, affirmatively require that

> non-record materials, such as . . . preliminary worksheets and similar papers that need not be made a matter of record, *shall not be incorporated in the official files of the agency.* 41 C.F.R. §101-11.401-3(d) (emphasis added).

The notes of Dr. Kissinger's telephone conversations bear no resemblance to official government records. They are rough, unedited typescripts used only as workaids and never made part of the State Department's records system. They were not intended as permanent records of Dr. Kissinger's official actions, and cannot even be said to be accurate summaries of his conversations. They contain many personal and irrelevant matters which have no place in government files. They are at best "non-record materials" which, though accumulated as part of the records creation process, have no official significance after that process has been completed.

The State Department concluded, on the basis of its regulations and established practices, that the notes were not its records. The opinion of its Legal Adviser explains in detail why that decision was proper. App.65a. When the District Court reached a contrary result, it did not hold the State Department's regulations were invalid, or find that the Department had improperly applied them, or explain why the Legal Adviser's opinion was wrong. It ignored these matters altogether, and held instead that the notes were the



"property of the United States" because they were produced "on government time with the aid of department employees, equipment, materials, and other public resources." App. 58a. This holding rests solely on what the court called "a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer." App.56a.

This conclusion cannot even be accepted as an adequate statement of the "basic rule" it purports to apply.[18] But the question for this Court is whether FOIA authorizes federal judges so lightly to disregard agency rules, practices and decisions as they relate to recordkeeping. We believe the comprehensive scheme which Congress created for records management matters, the history of that legislation, and the widespread practice of agencies in treating various types of informal documents as "non-record materials," all demonstrate that no such result can be justified.[19]

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[18]The copyright cases the District Court cites make clear that the underlying question is whether the employee had an express or implied contractual obligation to create the contested literary or artistic work for his employer's use. *See, e.g., Schorr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). Whether Dr. Kissinger had an obligation to create the notes can only be determined by reference to the Department's rules and practices. Dr. Kissinger's duty as a government employee was to document his significant oral decisions, commitments and discussions. 5 FAM §423.2-1. This he did — not with the notes but with memoranda and other official documents and with the extracts he later made from the notes to assure completeness of the official files. The notes used in the preliminary stages of this documentation process were of no interest to his "employer," and he was free under the Department's interpretation of the employment relation to retain or discard them as he chose.

[19]FOIA has been amended twice, in 1974 and again in 1976. In neither case did Congress authorize private citizens to challenge agency recordkeeping determinations. The same committees that considered these amendments were simultaneously at work on the substantial revisions to FRA which were adopted in 1976. These revisions contain

FOIA assumes the existence of "agency records," without defining what they are, because Congress expected the agencies to make that determination. If an agency has classified a document as a record, it must produce it on proper demand unless one or more of the FOIA exemptions justifies its being withheld. The agency's claim of exemption is subject to *de novo* review, but the agency's decision to create a record or to procure a record or to file a document as a record is not. *Cf. Lybarger v. Cardwell*, 557 F.2d 764, 766-67 (1st Cir. 1978). FOIA — despite its important public information function — was never intended as a device to usurp agency recordkeeping decisions. "Agency records" means documents an agency has chosen to incorporate into its records system — not documents that journalists, historians, political scientists or other members of the general public think the agency should have in its files.

The State Department's decision here was based on an application of its own rules, as it interpreted them. That decision should have been accepted unless found to be arbitrary, capricious or contrary to law. *Udall v. Tallman*, 380 U.S. 1 (1965). No such finding was made. Even if FOIA implies some standard of review less restrictive than is

no hint that agency recordkeeping decisions should be subject to judicial review at the instance of private citizens. In 1974, these same committees considered, and Congress adopted, the Privacy Act. 5 U.S.C. §552a. This statute — unlike FOIA and FRA — expressly permits a private citizen to request amendment of records relating to him, and provides for *de novo* review of an agency's refusal to grant the request. *See* 5 U.S.C. §§552a(d)(2)(b)(1); 552a(g)(1)(2)(A).

The careful and essentially contemporaneous consideration which has been given to these three interrelated statutes shows that Congress knew how to provide for judicial review of agency recordkeeping determinations when it wished to do so. It also belies any suggestion that FOIA was intended to afford private citizens with a virtually unlimited right to contest such determinations in situations far removed from the limited circumstances defined in the Privacy Act.



usually required, it could not possibly authorize a court to ignore an agency's determination altogether. Yet that is what happened here. And it is inconceivable that the Act could ever justify the conclusion below that analogies to copyright law provide a better measure of what records are than agency regulations adopted pursuant to the Federal Records Act.[20] FOIA applies to "agency records"; it does not apply to "property" even if the "property" is documentary material.[21]

The District Court's analysis of the issues is plainly inadequate. The Court of Appeals did not choose to address them. We ask this Court to provide the mature consideration these important questions of federal law deserve, but have not as yet received.

[20]None of the lower courts that have been called upon to interpret the term "agency records" as used in FOIA has ever thought the common law is the proper source to consult for an answer. *See DiViaio v. Kelley*, 571 F.2d 538 (10th Cir. 1978); *Nichols v. United States*, 325 F.Supp. 130 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); *Save The Dolphins v. Department of Commerce*, 404 F.Supp. 407 (N.D. Cal. 1975); *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F. Supp. 630 (N.D. Ind. 1974).

[21]The District Court's conclusion on this point has other disturbing implications. The rationale adopted below — that any document produced by a federal employee on government time is government property — applies with equal force to unofficial but work-related papers created by Executive branch employees, by the President and Vice-President, by Congressmen, and by members of the Judiciary. Some of these federal employees have, like cabinet officers, donated collections of papers to libraries with no suspicion whatever that the act of donation represented an illegal alienation of government property. *See* note 8, *supra*. If the decision below stands, all restrictive covenants relating to such donations are vulnerable to challenge on the theory that the donor did not "own" the papers and thus had no right to control the manner of their disposition. *See Nixon v. Sampson*, 389 F.Supp. 107, 120-23, 133-45 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975), *dismissed as moot*, 437 F.Supp. 654 (D.D.C. 1977), *reversed and remanded for trial*, No. 77-2123 (D.C. Cir., Dec. 21, 1978).

### C. The Decision Below Invades Constitutional Rights of Privacy.

The decision below also raises serious questions of constitutional law — questions that affect not only Dr. Kissinger but also many other past and present government employees.

Government employees, like other citizens, have — or ought to have — a right to think, to explore, to discard, to develop ideas without fear that their thoughts will be prematurely published. Agency recordkeeping rules and practices recognize this fundamental right.

Agencies require employees to document decisions, commitments and significant discussions, *see* 5 FAM §423.2-1; 41 C.F.R. §101-11.202-2(b), but they do not require that every thought and every utterance be recorded. Rough drafts and working papers are not records; preliminary notes are not records; uncirculated papers filed as personal are not records. Such documents are not available to other employees unless the author commits them to the official files.

Agencies permit employees to keep personal papers in their offices, and to remove them when they retire or change positions. *See* 5 FAM §§432, 417.1; 41 CFR §§101-11.202-2(d), 101-11.406-6(c). Agencies may discipline employees who fail to keep proper records of their activities; they do not, however, search for records in their employees' desk drawers and private files. Unfiled and uncirculated papers are presumptively private; they may not be inspected by anyone unless constitutional procedures are followed.[22]

[22]Respondents argued below that Dr. Kissinger should have submitted the telephone notes — which were stored in his personal files — for review by the Department's records officers before removal. There is no such requirement. The Department's regulations expressly recognize that papers which have been "explicitly designated and filed as personal at the time of origin or receipt may be removed. . . without approval of the Director, Foreign Affairs Document and Reference Center." 5 FAM §417.1a. The Department's chief administrative officers — including the Director of FADRC— knew the telephone notes were in Dr. Kissinger's personal files when those files were transferred to the Library of Congress. JA 273. Each expressly approved the transfer. App. 81a, 83a.



In *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F.Supp. 630 (N.D.Ind. 1974) — a case the courts below chose to ignore — the issue was whether notes made by Atomic Energy Commission staff members "[i]n executing their responsibilities relating to AEC's health and safety environmental reviews," *id.* at 633, were "agency records" subject to the Act. The court held they were not:

> Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records", nor is there any indication . . . that anyone other than the author exercises any control over such documents.
>
> . . . [T]he Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly. . . . [T]heir disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. *Id.*

It is undisputed here that some of the telephone notes contain purely personal conversations having no connection

with government business. Other notes, though business-related, reflect personal observations, thoughts, opinions, and beliefs. Many also include expressions of privately held views about politics, personal details concerning third parties, and information relating to Dr. Kissinger's associations with individuals and organizations. This is equally true of statements made by those with whom he spoke. Such matters have no place in public records.

Dr. Kissinger had no duty to make notes of his telephone conversations. His decision to make and keep them was predicated on the belief that they were private papers — a belief which was consistent with the State Department's rules, policies and practices. If the position adopted by the courts below had been the law when he was in office, he either would not have made the notes at all or would have edited and corrected them before they were filed as official records. The retroactive — and unprecedented — decision below that these papers are "agency records" frustrates Dr. Kissinger's legitimate expectations of privacy. No court should tolerate such a result.[23]

The District Court's order raises even more serious questions. Although the District Court acknowledged that the notes were "personal in some respects," App. 58a, it nonetheless directed the State Department to possess and read all of them. None — regardless of content — is to be returned. This procedure would not have been available under the State Department's own regulations and, indeed,

[23]The Final Report of the National Study Commission recommends that Congress adopt legislation to clarify ambiguities in current practices concerning the right of agency officials to retain non-record materials. National Study Commission, Final Report 19, 32-33 (1977). However, it stresses that any such legislation should be made prospective to "avoid legal problems. . . and provide notice to Federal Officials as to changes necessary to comply with the recommendations." *Id.* at 8. The Commission's sensible — and sensitive — approach sharply contrasts with the total disregard for privacy rights that is reflected in the decision below. *See Id.* at 124.



would have been unconstitutional had the Department attempted it when Dr. Kissinger was its employee. It is no less unconstitutional when ordered by a court.

Respondents argued below that this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), could justify seizure and processing of the notes so they would become available for public disclosure under FOIA.[24] The District Court cited no authority to support its order. If *Nixon* was, indeed, its inspiration, we believe the court misapplied it.

*Nixon* sustained the constitutionality of special legislation which applied only to the former President "as a legitimate class of one." 433 U.S. at 472, 486, 491. This Court held in *Nixon* that the intrusion into privacy which the legislation made necessary did not for that reason invalidate it, because this was the least intrusive means of accomplishing national interests of overriding importance. *Id.* at 456-57, 467. It certainly did *not* hold that inspection of private papers by government employees is appropriate in any and all cases involving former public officials.

The rationale of *Nixon* has no application here. Here, the Government does not claim the documents. Here, no criminal laws are involved. And here, no provision has been made for the return of admittedly private and personal materials. There is no precedent or justification for seizing, searching and retaining any of the notes. The order entered below is supported neither by *Nixon* nor by any other judicial decision. It is unconstitutional and it should be set aside.

[24]No other authority was cited, because none exists. The general rule in civil cases is that a party need deliver only those documents "relevant in purpose" to the inquiry after his own review of the documents. *See v. City of Seattle*, 387 U.S. 541, 544 (1967); *In re Horowitz*, 482 F.2d 72, 78 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Disputed documents must be reviewed by an impartial judicial officer, not an Executive branch employee. No court has ever held that private citizens may compel another private citizen to submit his papers for Executive branch review in order to facilitate their desire to read them.

## CONCLUSION

That Dr. Kissinger kept notes of his telephone conversations is not unusual; senior government officials have for decades followed the same practice. Nor is it unusual that the notes were kept in private files; materials of this type have always been treated by the State Department and by other agencies as personal papers which the authors could discard or retain at their discretion.

When Dr. Kissinger left office, he did not simply remove his private files and do with them as he pleased. Instead, he donated his personal papers and other documents relating to his years in government to the Library of Congress so that the entire record of his period would be collected in one place for the convenience of future scholars. This was done openly, with the knowledge and approval of the State Department's principal administrative officers and in full compliance with its rules and policies.

Respondents candidly admitted below that their reason for instituting this lawsuit was to gain access to what they characterized as an "invaluable" collection of "background materials" on American foreign and domestic policy. That respondents want access to the notes is perhaps understandable, if short-sighted.[25] But the

[25]The decision below, if sustained, is unlikely to enhance the long-range interests of history. As a prominent historian recently said:

> [s]ome of the republic's most precious historical sources have been the diaries . . . of cabinet ministers from Gideon Welles and Salmon P. Chase to Harold Ickes and Henry Wallace — diaries bearing on the discharge of official duties, written on government foolscap or dictated to government secretaries, often no doubt during working hours. The Smith standard, by making these invaluable documents the property of the state, not of the person who, beyond any official requirement, kept them, would thereby insure that they would never have been kept . . . . Surely, it would be better for historians to wait a few years and have this valuable collection than, by insisting on immediate access, discourage all Kissinger's successors from following his example.

Statement of Arthur Schlesinger, Jr., before the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations 2-4 (March 2, 1978).



question here is whether FOIA supports their claim. We think it does not. FOIA applies to "agency records" — not to "background materials" or to personal papers.

The notes now belong to the United States by reason of Dr. Kissinger's voluntary gift to the Library of Congress. They will become publicly available when the privacy interests of Dr. Kissinger and those with whom he spoke no longer require protection, and when the whole historical record of Dr. Kissinger's time in government can be viewed dispassionately. That the notes may contain materials which respondents would like to read — or might profit by reading — provides no reason to twist the law or the Constitution.

We ask this Court to grant certiorari so that the important questions here presented may be reviewed and decided in accordance with the law.

Respectfully submitted,

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